Information Commissioner's Office

Consultation:

Age Appropriate Design code

Start date:15 April 2019

End date: 31 May 2019

ico.
Information Commissioner's Office

Introduction

The Information Commissioner is seeking feedback on her draft code of practice Age appropriate design - a code of practice for online services likely to be accessed by children (the code).

The code will provide guidance on the design standards that the Commissioner will expect providers of online 'Information Society Services' (ISS), which process personal data and are likely to be accessed by children, to meet.

The code is now out for public consultation and will remain open until 31 May 2019. The Information Commissioner welcomes feedback on the specific questions set out below.

Please send us your comments by 31 May 2019.

Download this document and email to:
ageappropriatedesign@ico.org.uk

Print off this document and post to:
Age Appropriate Design code consultation
Policy Engagement Department
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

If you would like further information on the consultation please telephone 0303 123 1113 and ask to speak to the Policy Engagement Department about the Age Appropriate Design code or email ageappropriatedesign@ico.org.uk

Privacy statement

For this consultation, we will publish all responses except for those where the respondent indicates that they are an individual acting in a private capacity (e.g. a member of the public or a parent). All responses from organisations and individuals responding in a professional capacity (e.g. academics, child development experts, sole traders, child minders, education professionals) will be published. We will remove email addresses and telephone numbers from these responses but apart from this, we will publish them in full.

For more information about what we do with personal data, please see our privacy notice.

Section 1: Your views

Q1. Is the '**About this code'** section of the code clearly communicated?

No
If NO, then please provide your reasons for this view.

BT welcomes the opportunity to respond to this draft Code on age appropriate design.

BT is supportive of the principles set out in the 16 standards of age-appropriate design as they apply to children's data and privacy, outlined in the opening of the draft code. We are also supportive of the broader ambition to seek to better protect children's data, and that protecting them from harm when they are online is sometimes best achieved by more careful collection or use of their data.

However, we have significant concerns about the wording of the detailed standards in the current draft of the Code which we urge the ICO to consider and address before moving to the next stage.

To put this in context, BT understands that the GDPR says that children's privacy requires "particular care" and "specific attention" because of their vulnerability and differing appreciation of risk. And that the DPA 2018 therefore aims to transform this into something meaningful by requiring the ICO to implement this Code. Compliance with the Code will assist companies in complying with multiple

requirements of the GDPR and "in particular … sets out practical measures and safeguards to ensure processing under the GDPR can be considered 'fair' in the context of online risks to children."

Our particular concerns centre on (i) the need for clarity of scope (ii) overlap between the Code and areas that are already well regulated (iii) the need to take a risk based approach (iv) the need for the Code to be principles based rather than prescriptive, (v) implementation period.

Q2. Is the '**Services covered by this code'** section of the code clearly communicated?

No
 If NO, then please provide your reasons for this view

1. Scope

The current definition of services in scope being Information Society Services is both too broad and too vague.

There are specific areas, for example the application of parental controls or the BT Sport App, where we understand and indeed welcome that these services will fall within scope of the Code.

BT's understanding is that the code is not intended to catch our core services of fixed broadband or mobile connectivity.

Connectivity services do fall into the very broad definition of an 'Information Society Service' in the ecommerce directive. However, these services on the whole act as a simple pipe (or 'mere conduit'), merely conveying information, and not "processing" personal data. We therefore understand that this takes these services back out of scope the GDPR / DPA and the Code.

This is supported by the ICO guidance on the definition of "controller" and "processor", where the regulator gives the example of a secure mail delivery service for a hospital. Because the deliverer cannot access the content of the mail, the ICO says "it cannot be said to be processing" .

Examples given in the draft code both of services in scope, and how the code should be implemented also point to this, as they describe OTT services "apps, programs and many websites including search engines, social media platforms, online messaging services, online marketplaces, content streaming services… online games, news or educational websites, any websites offering other goods or services to users over the internet. Electronic services for controlling connected toys and other connected devices are also ISS."

The detailed requirements set out in the code are not compatible with the way connectivity services operate.

Therefore, BT would like the final version of this Code to make clear that fixed or mobile connectivity services that are not processing data are out of scope.

In the future the Government and the ICO may consider that it is appropriate to bring connectivity services in scope of a later iteration of the Code.

If so, this requires further consideration of what age appropriate design would entail for connectivity service providers. And then to develop a separate, appropriately considered and consulted upon section of the Code which sets out requirements from a basis of understanding of the way connectivity services operate, in a different way in a different part of the Information Society Services value chain to OTT services.

This process would need more time, but BT would welcome discussions with the ICO and other stakeholders to consider how a later version of the code could cover connectivity services, in due course.

2. Overlap between the Code and existing and proposed future legislation / regulation

The Code overlaps with several areas of existing or proposed regulation. Some of these, most notably video on demand services are already regulated via the implementation of the audio visual media services directive (AVMSD) in the UK. Others such as the Online Harms White Paper, and the Code of Practice on Child Sexual Exploitation and Abuse it posits, are in draft form but are expected to form the basis for new legislation and regulation in due course.

As such there are several areas of existing or potential conflict.

For VOD services, this draft Code has not considered that these are frequently household services, where one service is supplied to a household with several different people, often families including adults and children, as opposed to the direct and individual relationship between a service and its users that the Code presumes.

As VOD services have their origin in TV services, and like them their distinguishing feature, noted in the scope of the AVMSD is that they are 'under the editorial responsibility of a media service provider – meaning they control and selection and organisation of the programmes' . There has been considerable thought given over a long period of time by legislators and regulators how best to regulate these services, in order

to protect children that have access to them while also ensuring the adult that view them can watch a wider range of content if they choose to do so.

In live linear TV the approach is time gating (most notably the 9pm watershed) and the recent update of the AVMSD requires at a minimum that 'appropriate measures for the protection of minors applicable to television broadcasting services should also apply to on-demand audiovisual media services'. The Government likely via Ofcom will consult on implementing the updated AVMSD shortly and this is the appropriate mechanism for strengthening protections in this area, so the Code should not seek to over-write this. For VOD content PIN protection of equivalent post watershed content is likely to be required, which in any case all the PSB catch up players and major UK commercial TV players already utilise.

For the Online Harms White Paper, there will be considerable overlap of services in scope of both this Code and the regulatory regime the Online Harms White Paper anticipates, including a further Code of Practice on Child Sexual Exploitation and Abuse. Both the Online Harms White Paper and this draft Code on Age Appropriate Design have a view on child protection beyond data processing, but the White Paper's approach is more based on proportionality and risk assessment.

BT considers that these areas and potential areas of double regulation with differing approaches are problematic. To resolve them we propose that:

a) The scope should be further clarified such that, alongside linear TV services, it only applies to services not already in scope of AVMSD regulation. And that,

b) The ICO establishes the areas of overlap between the Age Appropriate Design Code and other legislative and regulatory proposals. And then considers in discussion with these other authorities which regime should cover which services, or which aspect of which services and the points of interaction or hand off between the regimes, so that there is not double regulation.

For example, it may be preferable that this Code deals solely with data protection issues and harms directly caused by data issues, while the proposed Online Harms regime and its Code of Practice on Child Sexual Exploitation and Abuse addresses behavioural online harms and real world child protection. This Code will need to provide the basis under which data needed to enable appropriate child protection can be collected. Clarifying this: that while in general this Code's purpose is to reduce the amount of data collected on children, it also provides for

data to be collected where it enables their better protection, would help to resolve tensions and contradictions in the current draft.

3. Risk based approach.

This aspect of the current draft of the Code is under-developed. The draft Code only refers to the underlying law (GDPR and DPA) being "risk-based": "The UK data protection regime is set out in the Data Protection Act 2018 (DPA 2018) and the GDPR. This regime requires you to take a risk-based approach when you use people's data, based on certain key principles, rights and obligations".

There is no equivalent reference to the Code itself requiring such an approach and we ask that the draft is re-worked to be consistent with the requirements of the DPA2018.

We note that the regulatory framework proposed in the Online Harms White Paper and the Code of Practice on Child Sexual Exploitation and Abuse it anticipates both take a risk based approach. It is essential that this Code does the same to maintain consistency and alignment across these overlapping areas of regulation.

4. Principles based not prescriptive

The GDPR and DPA are principled based – whereas this draft Code is very prescriptive. BT finds this to be problematic: while we are very supportive of the intent to improve online protections for children, this draft of the Code asks service provides to step into the shoes of parents too often.

Moreover, experience shows that the more prescriptive an approach is, the quicker it becomes out of date as technology moves on. Whereas more principles based approaches are more 'future proof' as the principles continue to apply even as technology and the market moves on.

5. Implementation period

The requirements of the Code are a significant step change in how OTT services operate. To enable businesses to prepare and comply appropriately and with minimum distribution to the user experience, BT suggests that an implementation period of at least a year once a final reworked version of the Code is agreed, would be appropriate.

Conclusion

BT considers this draft Code to be a significant step forward in terms of protecting children's data online. As such we are keen to engage with the ICO to discuss the points above.

In our view, this draft would be much improved by: clarifying that the scope does not include connectivity services; reconsidering this draft in light of existing and intended regulation to clarify either that services already regulated are out of scope, or where they are covered by more than one regime why this is appropriate and how the regimes interact; ensuring that the requirements of the Code are risk and principles based rather than prescriptive; an implementation period of a workable length to enable businesses to prepare and comply.

We would very much welcome the opportunity to discuss these points with the ICO in due course.
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Standards of age-appropriate design

Please provide your views on the sections of the code covering each of the 16 draft standards

1. Best interests of the child: The best interests of the child should be a primary consideration when you design and develop online services likely to be accessed by a child.

2. Age-appropriate application: Consider the age range of your audience and the needs of children of different ages. Apply the standards in this code to all users, unless you have robust age-verification mechanisms to distinguish adults from children.

3. Transparency: The privacy information you provide to users, and other published terms, policies and community standards, must be

concise, prominent and in clear language suited to the age of the child. Provide additional specific 'bite-sized' explanations about how you use personal data at the point that use is activated.

4. Detrimental use of data: Do not use children's personal data in ways that have been shown to be detrimental to their wellbeing, or that go against industry codes of practice, other regulatory provisions or Government advice.

5. Policies and community standards: Uphold your own published terms, policies and community standards (including but not limited to privacy policies, age restriction, behaviour rules and content policies).

6. Default settings: Settings must be 'high privacy' by default (unless you can demonstrate a compelling reason for a different default setting, taking account of the best interests of the child).

7. Data minimisation: Collect and retain only the minimum amount of personal data necessary to provide the elements of your service in which a child is actively and knowingly engaged. Give children separate choices over which elements they wish to activate.

8. Data sharing: Do not disclose children's data unless you can demonstrate a compelling reason to do so, taking account of the best interests of the child.

9. Geolocation: Switch geolocation options off by default (unless you can demonstrate a compelling reason for geolocation, taking account of the best interests of the child), and provide an obvious sign for children when location tracking is active. Options which make a child's location visible to others must default back to off at the end of each session.

10. Parental controls: If you provide parental controls give the child age appropriate information about this. If your online service allows a parent or carer to monitor their child's online activity or track their location, provide an obvious sign to the child when they are being monitored.

11. Profiling: Switch options based on profiling off by default (unless you can demonstrate a compelling reason for profiling, taking account of the best interests of the child). Only allow profiling if you have appropriate measures in place to protect the child from any harmful effects (in particular, being fed content that is detrimental to their health or wellbeing).

12. Nudge techniques: Do not use nudge techniques to lead or encourage children to provide unnecessary personal data, weaken or turn off privacy protections, or extend use.

13. Connected toys and devices: If you provide a connected toy or device ensure you include effective tools to enable compliance with this code

14. Online tools: Provide prominent and accessible tools to help children exercise their data protection rights and report concerns.

15. Data protection impact assessments: Undertake a DPIA specifically to assess and mitigate risks to children who are likely to access your service, taking into account differing ages, capacities and development needs. Ensure that your DPIA builds in compliance with this code.

16. Governance and accountability: Ensure you have policies and procedures in place which demonstrate how you comply with data protection obligations, including data protection training for all staff involved in the design and development of online services likely to be accessed by children. Ensure that your policies, procedures and terms of service demonstrate compliance with the provisions of this code

Q3. Have we communicated our expectations for this standard clearly?

1. **Best interests of the child**
YES/NO.   If NO, then please provide your reasons for this view.
2. Age-appropriate application
YES/NO.   If NO, then please provide your reasons for this view.
3. Transparency
YES/NO   If NO, then please provide your reasons for this view.

4. Detrimental use of data
YES/NO.   If NO, then please provide your reasons for this view.
5. Policies and community standards
YES/NO.   If NO, then please provide your reasons for this view.
6. Default settings
YES/NO.   If NO, then please provide your reasons for this view.
7. Data minimisation
YES/NO.   If NO, then please provide your reasons for this view.
8. Data sharing
YES/NO.   If NO, then please provide your reasons for this view.
9. Geolocation
YES/NO.   If NO, then please provide your reasons for this view.
10. Parental controls
YES/NO.   If NO, then please provide your reasons for this view.
11. Profiling
YES/NO. If NO, then please provide your reasons for this view.
12. Nudge techniques
YES/NO.   If NO, then please provide your reasons for this view.
13. Connected toys and devices
YES/NO.   If NO, then please provide your reasons for this view.
14. Online tools

YES/NO.
If NO, then please provide your reasons for this view.
15. Data protection impact assessments
YES/NO.
If NO, then please provide your reasons for this view.
16. Governance and accountability
YES/NO. If NO, then please provide your reasons for this view.

Q4. Do you have any examples that you think could be used to illustrate the approach we are advocating for this standard?

1. **Best interests of the child**
YES/NO. If YES, then please provide details.
2. Age-appropriate application
YES/NO. If YES, then please provide details.
3. Transparency
YES/NO. If YES, then please provide details.
4. Detrimental use of data
YES/NO. If YES, then please provide details.
5. Policies and community standards
YES/NO. If YES, then please provide details.
6. Default settings:
YES/NO. If YES, then please provide details.
7. Data minimisation

YES/NO.   If YES, then please provide details.

8. Data sharing

YES/NO.   If YES, then please provide details.

9. Geolocation

YES/NO.   If YES, then please provide details.

10. Parental controls

YES/NO.   If YES, then please provide details.

11. Profiling

YES/NO.   If YES, then please provide details.

12. Nudge techniques

YES/NO.   If YES, then please provide details.

13. Connected toys and devices

YES/NO.   If YES, then please provide details.

14. Online tools

YES/NO.   If YES, then please provide details.

15. Data protection impact assessments

YES/NO.   If YES, then please provide details.

16. Governance and accountability

YES/NO.   If YES, then please provide details.

Q5. Do you think this standard gives rise to any unwarranted or unintended consequences?

1. **Best interests of the child**
YES/NO. If YES, then please provide your reasons for this view.
2. Age-appropriate application
YES/NO.   If YES, then please provide your reasons for this view.
3. Transparency
YES/NO.   If YES, then please provide your reasons for this view.
4. Detrimental use of data
YES/NO. If YES, then please provide your reasons for this view.
5. Policies and community standards
YES/NO.   If YES, then please provide your reasons for this view.
6. Default settings
YES/NO.   If YES, then please provide your reasons for this view.
7. Data minimisation
YES/NO.   If YES, then please provide your reasons for this view.
8. Data sharing
YES/NO.   If YES, then please provide your reasons for this view.
9. Geolocation
YES/NO.   If YES, then please provide your reasons for this view.
10. Parental controls
YES/NO.   If YES, then please provide your reasons for this view.
11. Profiling
YES/NO.   If YES, then please provide your reasons for this view.
12. Nudge techniques

YES/NO.
If YES, then please provide your reasons for this view.
13. Connected toys and devices
YES/NO.   If YES, then please provide your reasons for this view.
14. Online tools
YES/NO.   If YES, then please provide your reasons for this view.
15. Data protection impact assessments
YES/NO.   If YES, then please provide your reasons for this view.
16. Governance and accountability
YES/NO.   If YES, then please provide your reasons for this view.

Q6. Do you envisage any feasibility challenges to online services delivering this standard?

1. **Best interests of the child**
YES/NO. If YES, then please provide details of what you think the challenges are and how you think they could be overcome.
2. Age-appropriate application
YES/NO.   If YES, then please provide details of what you think the challenges are and how you think they could be overcome.
3. Transparency
YES/NO.   If YES, then please provide details of what you think the challenges are and how you think they could be overcome.
4. Detrimental use of data
YES/NO.   If YES, then please provide details of what you think the challenges are and how you think they could be overcome.
5. Policies and community standards

YES/NO.
If YES, then please provide details of what you think the challenges are and how you think they could be overcome.
6. Default settings
YES/NO.

If YES, then please provide details of what you think the challenges are and how you think they could be overcome. |
| **7. Data minimisation** |
| YES/NO.

If YES, then please provide details of what you think the challenges are and how you think they could be overcome. |
| **8. Data sharing** |
| YES/NO.

If YES, then please provide details of what you think the challenges are and how you think they could be overcome. |
| **9. Geolocation** |
| YES/NO.

If YES, then please provide details of what you think the challenges are and how you think they could be overcome. |
| **10. Parental controls** |
| YES/NO.

If YES, then please provide details of what you think the challenges are and how you think they could be overcome. |
| **11. Profiling** |
| YES/NO.

If YES, then please provide details of what you think the challenges are and how you think they could be overcome. |
| **12. Nudge techniques** |
| YES/NO.

If YES, then please provide details of what you think the challenges are and how you think they could be overcome. |
| **13. Connected toys and devices** |
| YES/NO.

If YES, then please provide details of what you think the challenges are and how you think they could be overcome. |
| **14. Online tools** |
| YES/NO. |

If YES, then please provide details of what you think the challenges are and how you think they could be overcome.
15. Data protection impact assessments
YES/NO.   If YES, then please provide details of what you think the challenges are and how you think they could be overcome.
16. Governance and accountability
YES/NO. If YES, then please provide details of what you think the challenges are and how you think they could be overcome.

Q7. Do you think this standard requires a transition period of any longer than 3 months after the code come into force?

1. **Best interests of the child**
YES/NO. If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.
2. Age-appropriate application
YES/NO.   If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.
3. Transparency
YES/NO.   If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.
4. Detrimental use of data
YES/NO.

If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

5. Policies and community standards

YES/NO.
If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

6. Default settings

YES/NO.
If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

7. Data minimisation

YES/NO.
If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

8. Data sharing

YES/NO.
If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

9. Geolocation

YES/NO.
If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

10. Parental controls

YES/NO.
If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

11. Profiling

YES/NO.

If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

12. Nudge techniques
YES/NO.   If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

13. Connected toys and devices
YES/NO.   If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

14. Online tools
YES/NO.   If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

15. Data protection impact assessments
YES/NO.   If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

16. Governance and accountability
YES/NO.   If YES, then please provide your reasons for this view, and give an indication of what you think a reasonable transition period would be and why.

Q8. Do you know of any online resources that you think could be usefully linked to from this section of the code?

1. **Best interests of the child**
YES/NO.

If YES, then please provide details (including links).

2. Age-appropriate application

YES/NO.

If YES, then please provide details (including links).

3. Transparency

YES/NO.

If YES, then please provide details (including links).

4. Detrimental use of data

YES/NO.

If YES, then please provide details (including links).

5. Policies and community standards

YES/NO.

If YES, then please provide details (including links).

6. Default settings

YES/NO.

If YES, then please provide details (including links).

7. Data minimisation

YES/NO.

If YES, then please provide details (including links).

8. Data sharing

YES/NO.

If YES, then please provide details (including links).

9. Geolocation

YES/NO.

If YES, then please provide details (including links).

10. Parental controls

YES/NO.

If YES, then please provide details (including links).

11. Profiling

YES/NO.

If YES, then please provide details (including links).

12. Nudge techniques

Yes

If YES, then please provide details (including links).

13. Connected toys and devices

No
If YES, then please provide details (including links).
14. Online tools
YES/NO.
If YES, then please provide details (including links).
15. Data protection impact assessments
YES/NO.
If YES, then please provide details (including links).
16. Governance and accountability
YES/NO.
If YES, then please provide details (including links).

Q9. Is the '**Enforcement of this code'** section clearly communicated?
YES/NO.
If NO, then please provide your reasons for this view.
Q10. Is the '**Glossary'** section of the code clearly communicated?
YES/NO.
If NO, then please provide your reasons for this view.
Q11. Are there any key terms missing from the '**Glossary'** section?
YES/NO.
If YES, then please provide your reasons for this view.

Q12. Is the '**Annex A: Age and developmental stages'** section of the code clearly communicated?

YES/NO.

If NO, then please provide your reasons for this view.

Q13. Is there any information you think needs to be changed in the '**Annex A: Age and developmental stages**' section of the code?

YES/NO.

If YES, then please provide your reasons for this view.

Q14. Do you know of any online resources that you think could be usefully linked to from **the 'Annex A: Age and developmental stages**' section of the code?

YES/NO.

If YES, then please provide details (including links).

Q15. Is the '**Annex B: Lawful basis for processing'** section of the code clearly communicated?

YES/NO.

If NO, then please provide your reasons for this view.

Q16. Is this '**Annex C: Data Protection Impact Assessments'** section of the code clearly communicated?

YES/NO.

If NO, then please provide your reasons for this view.

Q17. Do you think any issues raised by the code would benefit from further (post publication) work, research or innovation?

YES/NO.

If YES, then please provide details (including links).

Section 2: About you

Are you:

A body representing the views or interests of children? Please specify:	☐
A body representing the views or interests of parents? Please specify:	☐

A child development expert? Please specify:	☐
An Academic? Please specify:	☐
An individual acting in another professional capacity? Please specify:	☐
A provider of an ISS likely to be accessed by children? Please specify:	☐
A trade association representing ISS providers? Please specify:	☐
An individual acting in a private capacity (e.g. someone providing their views as a member of the public of the public or a parent)?	☐
An ICO employee?	☐
Other? Please specify:	☒

| BT Group: a broadband and mobile connectivity provider | |

Thank you for responding to this consultation.

We value your input.